U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 31 2006

EAC 03 266 55964

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as the vice president of marketing at CoreOptics. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel describes the petitioner's work and its significance:

> The beneficiary has made significant contributions to the field of optical communications and clearly presents a case superior to that of the petitioner in *New York State Department of Transportation*. . . .
>
> The proposed beneficiary's ongoing work and research is in providing the necessary optical components and equipment for the Department of Defense's Global Information Grid Bandwidth Expansion [redacted] Project. . . . The [redacted] project will allow the U.S. military to transmit more data [over] much longer distances with greater security. . . . As Vice President of Marketing [redacted] [the petitioner] plays a crucial role in the deployment of mission critical equipment for [redacted] project. [redacted] manufactures optical transponders for use in optical line cards. Optical line cards function as the ingress and egress points on an optical network and are fundamental for the successful expansion of the existing communication network. [redacted] project is currently in the Request for Proposal stage and [redacted] eamed up with [redacted] to develop a product offering that integrates [redacted] optical transponders. [The petitioner] is the key contact and main technical liaison for the integration efforts. His knowledge of the optical technology market both from a business sense as well as a technical sense is essential to the successful partnership between [redacted]

Counsel states that the petitioner "has obtained a series of letters from international experts in his field of specialization, attesting to his outstanding abilities. . . . These authors have prepared independent expert evaluations of [the petitioner's] accomplishments, contributions, and reputation for the purposes of this petition."

The letter contains unfinished, unsigned templates of three witness letters, along with signed, finished versions. For instance, one letter, to be signed by "Ario Biggatini," reads in part:

> [To be placed on Cisco Stationary (*sic*)]
>
> * * *
>
> I am in an excellent position to comment on the application on [the petitioner's] behalf. I currently serve as the Senior Manager, Product Qualification for Cisco Systems. I have know [*sic*] [the petitioner] since _____. **[Please elaborate on the nature of your knowledge of [the petitioner's] skills].** Through this work, [the petitioner] has demonstrated to me that he possesses advanced capabilities in the area of optical telecommunications with particular emphasis on _____. . . .
>
> [The petitioner] has produced as series [*sic*] of achievements in the field of optical telecommunications and tunable lasers over the course of his career, which have gained him acclaim, and serve to distinguish him from the vast majority of experts in his area of specialization. . . .
>
> In my estimation, [the petitioner] has risen to the top of his profession and should be recognized as such through the approval of this petition.

(Emphasis in original.) The record also contains templates of letters "To be placed on IOLON letterhead" for the signature of company president [redacted] and "To be placed on Lucent letterhead" for the signature of supply chain manager [redacted] All three individuals have signed letters incorporating the language in their respective templates. All three templates misspell the names of the purported "authors." [redacted] spells his name [redacted] These misspellings are another indication (beyond the bracketed, bold-type instructions) that the witnesses did not write these letters.

As to the claimed independence of the witnesses, the petitioner was formerly a vice president [redacted] (the name is routinely spelled without capitalization), where he worked under [redacted] has spent "the past two years collaborating [with the petitioner] on a joint development program"; [redacted] has known the petitioner "since 1995" and that the petitioner "has been working very closely with our engineers."

[redacted] template except to expand upon his own credentials. The discussion of the petitioner's work at iolon, and the assessment that the petitioner "ranks at or near the very top of the list of

individuals that I have encountered" is taken straight from the template. [redacted] states, evidently in his own words, that the petitioner "has been very instrumental in defining the specification . . . in development of the tunable optical devices and open tolerant optical modules and systems for our next generation transport platform."

Ario Bigattini has added the most to his template letter, stating:

> As [the petitioner] has pointed out in his publications on the topic of tolerant networks, the first important application of widely tunable lasers is inventory reduction and sparing. . . . The projected saving and economic impact for telecommunication industry will be in the hundreds of millions of dollars.
>
> In his network studies, [the petitioner] further discovered that, while applications in inventory reduction will drive much of the initial demand for tunable lasers, the real revolution will come when they are applied to make optical networks more flexible, secure and tolerant. . . .
>
> [The petitioner] has made significant contributions in promoting the state of the art of tunable laser technologies and system applications. . . . [The petitioner] has also made important contributions in the standardization of OIF (Optical Internetworking Forum) Small-Form-Factor Multi-Source Agreement common interface for tunable lasers, his idea such as Small Form Factor footprint, pluggable connector and pin out, etc., presented at an OIF meeting has been widely accepted and implemented in Tunable Laser Implementation Agreement (OIF2002.210.04) as the new industry standard.

The most detailed letter in the initial filing is from [redacted], managing director of [redacted] describes [redacted] project and its goal of ensuring that "the American military has . . . the best communications available." [redacted] describes [redacted] role in the project:

> [redacted] develops and manufactures modules and subsystems for ultra high-speed optical networking solutions for the telecommunications and the information technology industry. [redacted] current portfolio includes advanced 10 and 40 Giga bits per second transponders for the Internet Protocol (IP) Routers as well as the Metropolitan [redacted] optical transport systems.
>
> [redacted] advanced transponder solutions will be integrated into optical line cards of major companies such as [redacted]
>
> CoreOptics will play an important role in the [redacted] project through our partnering efforts. At the present time, we have partnered with Cisco and Lucent Technologies in their responses to [redacted] Request for Proposal. Specifically, our products will be included in the product offering of Cisco and [redacted] [The petitioner] will play a critical role in the integration of our product within the product suite offered by the winner(s) of the RFP. . . .

> [The petitioner's] expertise with optical networks and telecommunications products is critical to [redacted] success as a partner in the [redacted]

The description of the Request for Proposal indicates that no "winner(s)" had yet been chosen at the time of the above letter. Therefore, it appears to be mere speculation that [redacted] partner would be involved in [redacted] at all. The record contains no documentary evidence to show that, as of the filing date, [redacted] was part of [redacted] project. The waiver request appears to be predicated, in large part, on the expectation that [redacted] would eventually be involved with the project through its partnerships with one or more larger companies.

The overall importance of the [redacted] is not in dispute here, but the overall importance of the project is not equal to the importance of "[redacted] success as a partner in the [redacted] project." Whatever vested interest [redacted] may have in participating in the [redacted] it does not follow that it is in the national interest to ensure that [redacted] rather than some other company, provides the needed transponders for the project.

Counsel asserts that the petitioner's "ongoing work in this area benefits the nation as a whole because the applications of his knowledge will permit military personnel to communicate in a more efficient and precise manner." From the above description, however, it does not appear to be certain that [redacted] will participate in the [redacted] project at all. Rather, [redacted] is cooperating with larger companies in a "Request for Proposal." The submission includes no documentary evidence to show that [redacted] was involved (rather than hoped to be involved) in the [redacted] project at the time. A planned collaboration with one or more companies that had not yet been awarded contracts related to [redacted] project is a rather tenuous basis for a national interest waiver claim.

On July 11, 2005, the director issued a request for evidence (RFE), stating:

> Although the equipment designed by [redacted] may benefit the nation, your individual contribution does not appear to. Your particular job does not result in the development and design of new products that can be used by the military, etc. Your job is only to act as the intermediary between your company, other companies, and the Department of Defense. . . .
>
> The record does not clearly show that you are the initial or primary motivator behind the [redacted] project.

In response, the petitioner submits additional letters and other materials. [redacted] president of [redacted] states:

> [The petitioner] is a recognized national expert in the field of tunable optical lasers and networks and his role in the company combines his technical expertise with his business acumen, making him virtually irreplaceable. . . . His job responsibilities for CoreOptics include the following:

> --Definition of technical specification, marketing requirements and development of commercial specifications for CoreOptics product platforms for all Government and Commercial applications. . . .
>
> --Development and execution of CoreOptics North American product development and customer support strategies. . . .
>
> --Establishment of strategic technical and commercial alliance programs with major subsystems, components and system provider companies to deliver value-add services and products for optical networking applications
>
> --Establishment and leading of multi-disciplinary Sales and Marketing and Application Engineering organizations for CoreOptics product platforms
>
> --Development and execution [of] CoreOptics public, investor relations and branding initiatives via a nation-wide marketing campaign, public presentations and articles at trade shows and technology seminars. . . .
>
> While [the petitioner's] expertise and contributions undoubtedly benefit CoreOptics greatly, CoreOptics is an important subcontractor for major US based telecommunications systems manufacturers that provide equipment for the GIG-BE and various DOD projects. [The petitioner] plays a major role in making sure that CoreOptics meets its contract obligations. . . . [The petitioner] has primary responsibility for making sure that both the interests of our customers' projects and the company are served.
>
> Moreover, [the petitioner] has been very instrumental working with Lucent Technologies in defining the specifications for development of tunable optical devices for the Lambda Xtreme transport platform. . . . This Lucent flagship product is in wide deployment in the U.S. by many service providers. . . .
>
> Products like the Lambda Xtreme transport platform help the U.S. to maintain a competitive infrastructure, without which the country could fall behind in offering sufficient capacity and high speed data transmission for government, education and business.

The overall importance of the telecommunications industry is not in dispute. It does not necessarily follow, however, that every marketing executive of every subcontractor in that industry qualifies for a national interest waiver. The above letter indicates that the position filled by the petitioner is important for the interests of CoreOptics and its clients, but it does not persuasively show that the industry would suffer or drop behind foreign competitors if someone other than the petitioner occupied that position.

[redacted] also states: [redacted] would have been more than happy to act as his sponsor on the immigrant petition, however it was our understanding, based on advice from counsel, that it was not necessary, nor required for us to do so under the law."

[redacted], member of technical staff at Lucent Technologies, states that the petitioner "has been very instrumental in defining the specification . . . for the Lambda Xtreme transport platform," and that the petitioner "possesses outstanding technical and business abilities distinguishing him from the other highly qualified marketing managers in the field of Tunable lasers and EDC. [The petitioner's] work focus is to vastly improve the quality, speed and reliability while reducing the cost of optical network communications throughout the United States and the rest of the world."

[redacted] director of optical systems at Infinera Inc., who "worked with [the petitioner] while at Corvis Corporation," states that the petitioner's "technical role and his solid contributions in defining the product specification of optical platforms and subsystems developed in our industry has enabled the building of . . . next generation efficient, reliable, high performance and cost effective optical networks for government and commercial applications." These new letters establish the high opinions of clients and collaborators, but do not demonstrate the petitioner's wider reputation or impact within the field. We note that neither Dr. [redacted] any mention [redacted] their respective letters, a significant omission given the heavy emphasis that counsel had previously placed on [redacted] project.

The petitioner submits copies of published articles, presentation materials, and documentation regarding [redacted] These materials establish that the petitioner is active in his field and that he possesses detailed technical knowledge in addition to general business skills, but they do not establish that it is in the national interest to waive the job offer/labor certification requirement.

The director denied the petition on August 15, 2005. The director noted [redacted] statement that the company would have filed a petition on the petitioner's behalf, but refrained "on advice from counsel." The director stated: "The national interest waiver was not intended simply as a means for employers or self-petitioning beneficiaries to avoid the labor certification process," an assertion derived from *Matter of New York State Dept. of Transportation* at 223. The director stated that a list of the petitioner's responsibilities and duties is not strong evidence of eligibility. The director also noted the petitioner's submission of partially completed templates for three of the four initial witness letters, and stated that these templates diminish the credibility of those letters.

On appeal, counsel states: "The development and implementation of the U.S. DOD's [redacted] communications infrastructure project is clearly both in the national interest and national in scope. [The petitioner's] current employer, [redacted] produces transponder line cards which are critical to [redacted] project. As such, the national interests of the U.S. outweigh the need for Labor Certification." Elsewhere on appeal, counsel refers to the petitioner's "key role within the company in continuing to make sure it meets its commitments under the critical [redacted] DOD project." The record contains no documentation from the Department of Defense to establish the extent (or the existence) [redacted] "commitments under the critical [redacted] project." Being an executive for a subcontractor working with a defense contractor is not *prima facie* grounds for a waiver. Counsel asserts that the petitioner is essential to the project because,

among other reasons, he "is a Masters level engineer," an educational requirement that could be expressed on an application for a labor certification.

Counsel states that the director "improperly discounted letters . . . based on draft versions which were also submitted. CIS did not contact the authors. Also, there was no opportunity given to rebut the conclusion regarding the letters." The AAO has addressed this concern by considering the content of these letters that can reasonably be attributed to the individuals who signed them. The preliminary versions of the letters were not merely "draft versions" prepared by the signers; rather, it is obvious that they were templates prepared *for* the signers. This is clear because of the bracketed, bold-type instructions to insert specific personal information, and because none of the "draft versions" feature correct spellings of the witnesses' names. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to issue an RFE if required initial evidence is missing from the record, and 8 C.F.R. § 103.2(b)(16)(i) requires the director to advise the petitioner of derogatory evidence that is unknown to the petitioner. Neither of these regulations applies to the templates. Once a petitioner has submitted evidence, no regulation requires the director to warn the petitioner in advance of conclusions to be drawn from that evidence. The petitioner's opportunity "to rebut the conclusion" is the appeal itself, but the petitioner offers no such rebuttal; counsel merely protests the lack of an earlier opportunity to do so.

Counsel also states that the director "failed to address or discuss the evidence submitted in response to the RFE. Specifically, the denial failed to consider additional recommendation letters, and documentation of his technical presentations, seminars and documents authored." The AAO has addressed these additional letters. As for the technical documents, the director acknowledged the petitioner's technical expertise in his field, but asserted that such knowledge can be articulated on a labor certification and therefore is not a strong basis for a waiver.

We note that the petitioner is the beneficiary of a new petition, filed with an approved labor certification in March 2006. The new petition has been approved, with a priority date of October 2005 (based on the labor certification). Therefore, the petitioner, in this proceeding, seeks an exemption from a requirement that has now been met.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. This denial is without prejudice to ongoing adjustment proceedings resulting from the petition, with labor certification, recently approved on the alien's behalf.

**ORDER:** The appeal is dismissed.